No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this cause is reported in 118 F. (2d) 421 (R. 1040).

II.

JURISDICTION

1. The date of the decree to be reviewed is March 10, 1941 (R. 1050).

2. The specific claims advanced and rulings made in the lower court which are relied on as a basis of this Court's jurisdiction are:

(a) Petitioners claimed that in the light of the

Quinaielt Treaty of 1855 (12 Stat. 971) and of the Fifth Amendment and of Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406) the Secretary of the Interior had no power, in connection with and after giving his consent to the sale of timber by members of the Quinaielt Indian Tribe on allotted lands, to impose a system of regulations concerning the manner of logging the timber and the amount of timber sold (R. 110, 112). This claim was overruled by the Circuit Court of Appeals (R. 1040, 1049). Section 8, which is the one here specifically involved (25 U.S.C. 406) reads as follows:

> "The timber on any Indian allotment, held under a trust or other patent containing restrictions of alienation, may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit *under regulations* to be prescribed by the Secretary of the Interior." (Italics ours)

Section 7 (25 U.S.C 407), the adjoining section of the same Act, which reveals the differing intent of Congress as between sales of allotted and unallotted lands, reads as follows:

> "The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold *under regulations* to be prescribed by the Secretary of the Interior * * *" (Italics ours)

With respect to the foregoing sections, the Circuit Court of Appeals said: "We think it is without significance that Section 7 authorizes regulations govern-

ing the sale, whereas, Section 8 speaks of consent" (R. 1046; 118 F. (2d) 421, 424).

(b) Petitioners claimed that in the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971) which provides that "roads may be run through said Reservation, on compensation being made for any damage sustained thereby," and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. § 71) providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment (R. 110, 112) and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. § 406) authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, the Secretary of the Interior does not have the power to impose on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403) providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381) reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176) thus in effect enlarging and widening the extensive roads through the Reservation without providing compensation.

(c) The petitioners claimed that, in any event, the regulation of the Secretary of the Interior charging

the Indian allottees a fee of 8% to cover the Government's cost, through the Indian Agency, of supervising, estimating, selling, marking, scaling, collecting, disbursing and the like was illegal and void (R. 108, 112). The Circuit Court of Appeals denies this claim by holding that the Secretary could make regulations prescribing charges for the supervision and sale of Indian timber lands (R. 1049). The petitioners based their claim to exemption from these charges upon the Treaty with the Quinaielt Indians of 1855 (12 Stat. 971) which provides in Article X that:

> "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States and not deducted from their annunities."

In the light of this Treaty, petitioners further rested on Revised Statutes, § 2079 (25 U.S.C. 71) which provides that while Indian tribes are no longer recognized as independent nations with whom the United States may contract by treaty "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Petitioners contended that the Act of February 14, 1920, as amended (25 U.S.C. § 413) could, in the light of the Indian Treaty and the section of the Revised Statutes declaring a policy against impairment, be construed only as applying to Indian allotments where there was no controlling treaty; in other words, that the Act of 1920 must be construed in such manner as not to conflict with the Treaty and prior statutes, if possible.

The Circuit Court of Appeals ruled that it could

find nothing in the Treaty which could be thought to limit the power of Congress with respect to imposing fees on the gross proceeds of the sale of timber on Indian allotments.

3. The statutory provision under which jurisdiction is invoked is Section 240(a) of the Judicial Code, as amended (28 U.S.C. § 347).

4. The following cases are believed to sustain the jurisdiction of the Supreme Court:

Halbert v. U. S., 283 U.S. 753;
U. S. v. McGowan, 302 U.S. 535;
U. S. v. Powers, 305 U.S. 527;
U. S. v. U. S. Fidelity Co., 309 U.S. 506.

III.

STATEMENT OF THE CASE

The petitioners are Quinaielt Indians, owning trust-allotted lands in the Quinaielt Indian Reservation in the State of Washington. They brought this suit as allottees of lands, on behalf of themselves and of other allottees similarly situated.

The action was instituted against the Superintendent of the Taholah Indian Agency at Hoquiam, Washington, which is the agency of the Department of the Interior and the office of Indian Affairs in the administration of business of the Quinaielt Reservation, and against the Forest Supervisor of the Taholah Indian Agency, they being the persons who enforce the regulations of the Secretary of the Interior on the Quinaielt Reservation. The complaint in the District Court sought a declaration that the Indians have the power

to dispose of the timber on their allotments, and that regulations of the Secretary of the Interior which sought to regulate the sales of timber on Indian lands were illegal and void.

The Quinaielt Indian Reservation has about 200,000 acres, all being allotted land except about 100 acres. Less than 1% of the entire reservation is suitable for use as agricultural land (R. 944). There are 2340 allotments in the reservation, and 18% of it has been logged. All logging has been clear cut up to the summer of 1936. Since then on about 19 allotments the timber has been selectively logged by tree selection and by leaving the stands of timber on parts of the allotments, where no logging has been done, and by the leaving of a 200 foot strip on each side of the Olympic Highway, in the instances where the allotments border on or are cut through by the highway, in which strip no logging is permitted by the Department and by the Agency officials (R. 168, 169). About 100 of the allotment owners have tracts that either border on or are so situated that the Olympic Highway, a main travelled road, cuts through their allotments (R. 167, 168). About 1700 of the original allottees are now living; about 1200 allottees and heirs of deceased allottees live outside of the reservation (R. 165). The petitioners and about 230 others have contracted their timber on allotments for sale to one or more loggers, but no part of the timber on these allotments has been logged (R. 164). About 1400 allottees have made no contracts for the sale of their timber (R. 165). All contracts for the sale of timber were approved by the Secretary of the Interior as provided by law (R. 166).

There are outstanding four contracts for the sale of timber from the Quinaielt Indian Reservation: The Quinaielt Lake Unit sales contract, executed November 8, 1922, approved by the Secretary of the Interior January 18, 1923; the Mounts logging unit contract, executed June 29, 1923, approved by the Secretary of the Interior August 25, 1923; the Hall unit contract, executed January 10, 1928, approved by the Assistant Secretary of the Interior March 19, 1928; the Milwaukee Trail unit contract, executed August 14, 1937, approved by the Commissioner of Indian Affairs October 4, 1937 (R. 165, 166).

The first group of contracts had attached to them Indian Service General Timber Sale Regulations, issued in 1920, which are prescribed by the Department of the Interior as to the sale of Indian lands (R. 475, 477, 400). As of April 23, 1936, the office of Indian Affairs issued a new set of "General Forest Regulations" (R. 359), which were sought to be made applicable to the then existing contracts.

The provisions of the regulations particularly attacked by the Indian petitioners are the following:

1. Section 10 of the 1920 regulations, providing for selective logging (R. 403), which in fact was never enforced as written, prior to 1936, but particularly the enlarged and more specific selective cutting regulations included in the General Forest Regulations of 1936 (R. 359, 360), which provided that whenever practicable 25 to 60% of the merchantable timber should be left standing, to protect the site, provide seed for a new stand, and make possible a second cut before reproduction matures, and to preserve the forest for scenic pur-

poses along public highways, in the vicinity of Indian and white communities, and wherever the recreational or aesthetic value of the forest seems to exceed its value for the production of forest products (R. 361).

The Indian petitioners challenge the foregoing regulations as a violation of the Quinaielt Treaty of 1855 (12 Stat. 971), and of the Fifth Amendment, and as beyond the power of the Secretary of the Interior and his enforcement officers under the provisions of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857).

2. The petitioners challenge especially that provision of Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation of a strip of timber on each side of roads, trails and streams, and in the vicinity of camping places and recreation grounds, as amended by regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile on either side of the road, which in an amendment to the 1936 regulations was reduced to 200 feet on each side of the highway.

The Indian petitioners challenge the foregoing regulations upon the ground that they violate the Treaty of 1855, which provides that "if necessary for the public convenience, roads may be run through said reservation *on compensation being made for any damage sustained thereby*," and the Fifth Amendment, the effect of the permanent reservation of timber along highways, trails and streams, for scenic purposes being to widen the highway area for long distances, and to take large areas of timber for public use, and taking from the Indian timber owner his timber without compensa-

tion in direct violation of the Treaty, and the Fifth Amendment.

3. The provision of Section 50 of the General Forest Regulations of 1920 (R. 413, 414), charging the Indians an amount of 10% from the gross proceeds of sale to cover the Government's expenses, through the Indian Agency, of examining, advertising, marking, scaling, protecting the timber, and supervising the sale, as amplified by regulation number 19 of the General Forest Regulations of 1936 (R. 376), fixing the amount of compensation to the Government for said purposes at 8% of the gross amount received for the timber sold under regular supervision (R. 376).

The Indian petitioners challenge the foregoing regulations upon the ground that under Article 10 of the Treaty of 1855, which provides that "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States * * *", and under Revised Stat. § 2079 (25 U.S.C. § 71), which protects all Indian treaties prior to March 3, 1871, against impairment, the Secretary of the Interior can impose no charge for the supervision of Indian timber lands and sales thereon.

The District Court denied the defendants' motion to dismiss (R. 77; 28 F. Supp. 807) and later decided the cause on the merits in favor of the complainant Indians, holding the regulations sought to be enforced by the defendants invalid; and that the petitioners were suffering substantial and immediate detriment and irreparable injury, in that the enforcement of the regulations deprived the allottees of the right, conferred by Congress, to sell their timber, and illegally withheld

large portions of their timber from sale. The trial court therefore enjoined the enforcement of these regulations and any interference with the logging operations that the Indians might desire to have carried on under the sales contracts entered into by them (R. 150, 185; 31 F. Supp. 754).

The foregoing decision was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 1040; 118 F. (2d) 421). This decision of the Circuit Court of Appeals the Indian petitioners earnestly seek to review here.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that notwithstanding the Quinaielt Indian Treaty of 1855 (12 Stat. 971), which by adopting Article 6 of the Treaty with the Omahas restrains alienation only as to allottees who locate *permanent homes*, which has not been the case as to Quinaielt allotments, and notwithstanding the Fifth Amendment with respect to due process of law and just compensation, and notwithstanding Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406), the Secretary of the Interior had power, in connection with and after giving his consent to the sale of timber by members of the Quinaielt Indian Tribe on allotted lands, to impose a system of regulations concerning the manner and places of logging the timber and the amount of timber to be sold.

2. The Circuit Court of Appeals erred in holding that notwithstanding the Quinaielt Treaty of 1855 (12

Stat. 971), which provides that "roads may be run through said Reservation, on Compensation being made for any damage sustained thereby", and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. § 71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment with respect to due process of law and just compensation, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. § 406), authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, the Secretary of the Interior has the power to impose on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176), thus in effect enlarging and widening the extensive roads through the Reservation without providing compensation.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the regulations (R. 413, 414, 376) of the Secretary of the Interior charging a fee of 8% for the supervision and sale of timber on allotted lands was a valid regulation, notwithstanding the pro-

vision of the Quinaielt Indian Treaty of 1855 (12 Stat. 971) providing that the expenses of employees of the United States are to be defrayed by the United States, and Section 2079 of the Revised Statutes (25 U.S.C. § 71) providing that Indian treaties prior to March 3, 1871, should not be invalidated or impaired.

V.

ARGUMENT

Point A

The Decision Below Conflicts with Decisions of this Court

In its construction of the statutes involved, the decision of the Circuit Court of Appeals for the Ninth Circuit conflicts with *U. S. v. Algoma Lumber Co.*, 305 U. S. 415, in which it is held that the Indians are the actual beneficial owners of the allotted lands and that the contracts to sell timber on allotted lands are contracts between the Indian allottees and the purchasers, and that the Government is not a party to these contracts. The contracts were those of the Indians and not of the United States (305 U.S. 415, 422, 423). Therefore the Secretary could not, at the time of giving his consent or thereafter (as in the case of the 1936 regulations), attempt to add regulations to the contract. He was not a party to the contract. Congress empowered him solely and only to consent or refuse to consent to the contract between the actually contracting parties. If he gave his consent to the sale, which was the extent of his authority under the statute, the consent was effective, but the regulations sought to be attached to the contract were void.

The decision of the Circuit Court of Appeals also conflicts with *United States v. Shoshone Tribe*, 304 U.S. 111, 116-117, holding that the Indians are the substantial owners of reservation lands, and not the United States, and with *Chippewa Indians v. United States*, 301 U.S. 358, 375-6, holding the power of the government to manage Indian lands "is subject to constitutional limitations and does not enable the government * * * to deal with them as its own." While the government as to its own lands can dedicate to public use for scenic and recreational purposes large timber lands along roads, trails, and streams, it is submitted that it cannot do so as to Indian lands without providing for just compensation.

Point B

Important Questions of Indian Rights Are Involved Warranting Determination by this Court

(a) In the light of the Indian Treaty, the Fifth Amendment and the Statutes, the Secretary had no power to make the Regulations here involved.

The Quinaielt Treaty of 1855 (12 Stat. 971) in Article VI authorized the President to assign lots to individuals or families "on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas so far as it may be applicable." The Sixth Article of the Treaty with the Omahas (10 Stat. 1043, 1044) authorized the President to make allotments for *permanent homes*, and, *in such case only*, may impose the condition that the land shall not be aliened. But "these [Quinaielt] Indians are not the usual reservation Indians. They were

never placed on the reservation *or required to live within its limits.*" *Halbert v. United States*, 283 U.S. 753, 761. Only a very few of the many allottees actually live on the reservation, and their lands and the timber thereon are, therefore, not subject to restraints on alienation, so far as the treaty is concerned, and they own their lands and the timber thereon with ordinary powers of disposition, free of restraints as far as 25 U.S.C. § 406 is concerned, and hence free of consent or regulations.

In any event, if a valid restraint on alienation does exist, in Sections 7 and 8 of the Act of June 25, 1910, Congress sharply distinguished between the sale of timber on allotted lands and on unallotted lands. With respect to sales of timber on allotted lands, Congress provided that such timber might be sold *under regulations* to be prescribed by the Secretary of the Interior; but Congress provided that timber on allotted lands might be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof paid to the allottee *under regulations* to be prescribed by the Secretary of the Interior. The Circuit Court said that this clear and sharp difference in the text of the two adjoining sections as to how the power should be exercised was without significance. As to the timber on allotted lands here involved, it was clearly the intent of Congress that it could be sold *by the allottee*, on such terms as the allottee might prescribe, but that the sale on the terms and conditions fixed by the allottee would have to be submitted for the consent or rejection of the

Secretary. The learned trial judge pertinently said (R. 157, 158; 31 F. Supp. 754, 761):

"As I read the Statute, I am more impressed than ever with the thought that the object of the Congress was to grant to Indians certain rights which they did not have before as to timberlands and other matters.

"To me, the provisions of Sections 406 and 407 are absolutely meaningless, if we insist, as do the defendants, that under Section 405, or under the general control implied from the restraint on alienation, the Secretary of the Interior may, in the exercise of his own judgment, attach to sales conditions other than those which Congress prescribed. The only conditions, under Section 406, are that, on a sale of the timber by an Indian allottee (1) the consent of the Secretary of the Interior must be obtained and (2) the proceeds must be paid to the allottee or disposed for his benefit under *regulations* prescribed by the Secretary of the Interior.

"I cannot see how a Statute, which merely allows a Governmental officer to approve a contract and to control the disposition of the moneys derived from it, would give him power to condition his consent on regulations which he has no power to make and which add to the conditions of sale which the Congress has prescribed. The 'means' chosen by the Congress to control the sale of timber are exclusive of all others.

* * * * * * * *

"For, under such interpretation, [of the Secretary] the Indian can sell only the portion which the *Secretary of the Interior says he may.* However, as the Congress has said that the timber may

> be sold by the allottee, this *means all*—subject only to the consent of the Secretary of the Interior. The Secretary might refuse his consent without giving *any* reason at all. But he cannot condition it upon the imposition upon the Indian of a restriction, which he has no right to make, even though he may think it for the benefit of the group as a whole."

Congress intended that as to timber on allotted lands, the allottees should have the full power to sell and specify the terms of sale, and that the Secretary should have the power of consent or refusal, but it did not give him the power to give his consent and at the same time, or later, add regulations concerning the sale, as in the case of unallotted lands.

(b) The regulation setting aside 200 feet of timber on each side of the road was a taking of property for road purposes without compensation, in violation of the Quinaielt Treaty and in violation of petitioners' constitutional rights.

As to the regulation setting aside, for aesthetic and recreational purposes, 200 feet of timber on each side of the road for many miles in the Reservation, the Secretary, in substance and in fact, has enlarged and widened the extensive road areas throughout the Quinaielt Reservation, without providing compensation therefor, in what seems a manifest violation of the Quinaielt Treaty of 1855, a result that Congress clearly never intended or authorized, and which amounts to a taking of Indian property. *U. S. v. Klamath Indians*, 304 U.S. 119, 123; *Chippewa Indians v. U. S.*, 301 U.S. 358, 375-6; *Portmouth Co. v. U. S.*, 260 U.S. 327

(where government acts were held to amount to a taking).

(c) The regulation whereunder the Secretary charges the Indian allottees 8% of the gross proceeds of the timber sale violates the Quinaielt Treaty.

The Treaty with the Quinaielts of 1855 (12 Stat. 971) provides in Article X that:

> "the United States further agrees * * * the expenses * * * of employees * * * to be defrayed by the United States and not deducted from their annuities,"

Revised Statutes, Section 2079 (25 U.S.C. § 71) provides that while Indian tribes are no longer recognized as subject to the treaty-making power, yet no obligation of any treaty lawfully made or ratified with any Indian tribe or nation prior to March 3, 1871, should be invalidated or impaired. The Act of February 14, 1920 (25 U.S.C. 413) authorizing the Secretary in substance to charge reasonable fees for the supervision and sale of Indian timber lands, should, in the light of the Treaty and earlier statutes, be construed as applying only to the allotment of Indians not protected against expense of Governmental employees by a treaty antedating 1871. Thus construed the Act of February 14, 1920, as amended, is consistent with the Treaty and the prior statute, a result that should be judicially striven for if possible.

U. S. v. Payne, 264 U.S. 446;
Jones v. Meehan, 175 U.S. 1, 11;
U. S. v. Nez Perce County, 95 F. (2d) 232, 235-236.

Point C

Treaties and Statutes Affecting Indian Rights Should Be Liberally Construed

This cause involves treaty rights and statutory rights of Indians, which this Court has constantly said should be liberally construed (*U. S. v. Payne*, 264 U. S. 446, 448-9), and as to treaty rights particularly should be construed with "enlarged rules of construction," and "in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11; *Choate v. Trapp*, 224 U.S. 665, 675. This Court, recognizing the peculiar position of the Indian in this country, has been most solicitious that his rights be not denied except upon the judgment of the highest court in the land. Consequently this Court has often and recently granted certiorari in cases affecting the rights of Indians, *e.g.*:

Klamath & Modoc Tribes v. U. S., 296 U.S. 244;
Cate v. Beasley, 299 U.S. 30;
British American Oil Co. v. Board, 299 U.S. 159;
Shoshone Tribe v. U. S., 299 U.S. 476;
U. S. v. Seminole Nation, 299 U.S. 417;
U. S. v. McGowan, 302 U.S. 535;
Creek Nation v. U. S., 302 U. S. 620;
U. S. v. Shoshone Tribe, 304 U.S. 111;
Minnesota v. U. S., 305 U.S. 382;
U. S. v. Algoma Lumber Co., 305 U.S. 415;
U. S. v. Powers, 305 U.S. 527;
U. S. v. United States Fidelity & G. Co., 309 U.S. 506.

CONCLUSION

Before closing it should be noted in passing that the Circuit Court held, in the last paragraph of its opinion (R. 1049-1050) that it need not determine whether the Secretary of the Interior was an indispensable party to the suit and that it would assume that the action could properly be maintained against his subordinates who were actually undertaking to enforce the challenged regulations on the Indian Reservation. The following authorities support the view that the action could so properly be maintained against the subordinates of the Secretary who were carrying into effect the alleged wrong complained of by the petitioners:

Colorado v. Toll, 268 U.S. 228, 230;
Missouri v. Holland, 252 U.S. 416, 431;
Berdie v. Kurtz, 75 F. (2d) 898;
Brooks v. Dewar (U. S. Sup. Ct.) May 26, 1941.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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